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DATO' DR ABD ISA ISMAIL

v.

DATO' ABU HASAN SARIF & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR

ALIZATUL KHAIR OSMAN J

[APPLICATION FOR JUDICIAL REVIEW NO: R4-25-304-2009]

14 APRIL 2010

C

ADMINISTRATIVE LAW: *Judicial review - Remedies - Writ of quo warranto - Whether available as legal remedy - Principles to be applied - Whether available against members of State Legislative Assembly*

D

CONSTITUTIONAL LAW: *Legislature - State Assembly - Declaration of vacancy of seat - Assemblyman absent from two consecutive state assembly meetings in the same session - Discretion of Speaker whether to declare seat as vacant - Whether Speaker must refer matter to Standing Committee on Rights and Privileges - Constitution of the State of Kedah, art. 51*

E

CONSTITUTIONAL LAW: *Legislature - State Assembly - Membership - Assemblyman absent from two consecutive state assembly meetings in the same session - Discretion of Speaker whether to accept reason given for absence - Whether Speaker must refer matter to Standing Committee on Rights and Privileges - Constitution of the State of Kedah, art. 51*

F

CONSTITUTIONAL LAW: *Legislature - State Assembly - Prorogation of state assembly - Discretion of Sultan to prorogue state assembly - No proclamation issued to prorogue Assembly - Whether state assembly session prorogued - Whether next meeting of state assembly was part of same session - Constitution of the State of Kedah, art. 51*

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ELECTION LAW: *Election Commission - Powers - State Assemblyman absent from two consecutive state assembly meetings in the same session - Speaker refusing to accept reason given for absence - Speaker declaring seat vacant - Whether Election Commission could refuse to recognize seat as vacant - Whether Election Commission could require matter to be referred to Standing Committee on Rights and Privileges*

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WORDS AND PHRASES: *Meaning of phrase "two consecutive meetings" - Constitution of the State of Kedah, art. 51*

After the 12th General Election, His Royal Highness the Sultan of Kedah (“HRH”) summoned the 1st Meeting (of the First Session) of the Legislative Assembly of the State of Kedah (“the Assembly”) on 5 May 2008. Subsequently, HRH summoned the Assembly for the 2nd meeting (of the first session) on 20 May 2008, the 3rd meeting (of the first session) on 25 August 2008, the 4th meeting (of the first session) on 18 November 2008 and the 5th meeting (of the first session) on 19 April 2009. The 5th meeting (of the first session) was subsequently adjourned *sine die* and the 1st meeting (of the second session) was summoned on 9 August 2009. The 1st respondent was absent from the 5th meeting (of the first session) and the 1st meeting (of the second session) without leave of the applicant. When contacted by the assembly office on 12 August 2009 to inquire into his absence, the 1st respondent produced a letter dated 10 August 2009 together with a medical certificate dated 9 August 2009 to the Assembly’s Office and State Executive Meeting Council. The applicant did not accept the 1st respondent’s medical certificate and his reasons for being absent on 9 August 2009 on the grounds that: (i) if 1st respondent was unable to attend any meeting, he should have obtained leave from the applicant; (ii) the 1st respondent did not contact the applicant about his absence until he was contacted on 12 August 2009; (iii) the letter dated 10 August 2009 and the medical certificate dated 9 August 2009 were back-dated documents and was an afterthought; and (iv) the applicant had reason to believe that on 10 August 2009, the 1st respondent had organized and attended a programme making contributions to the victims of a natural disaster at a kampung. The programme was reported in a local newspaper. Pursuant thereto the applicant wrote a letter to the election office of the State of Kedah, informing them that there was a vacancy in the Kota Siputeh State Seat. The 2nd respondent replied on 7 September 2009 stating that: (a) the 1st respondent was still the Kota Siputeh Assemblyman and that there was no vacancy in the said State Seat; (b) the meetings which were not attended by the 1st respondent were not two consecutive meetings within the meaning of art. 51 of the Kedah Constitution (“art. 51”). The two consecutive absences must occur within one session; (c) the 2nd respondent accepted the medical certificate submitted by the 1st respondent as being the explanation for his absence at the 9 August 2009 meeting. The 1st respondent’s failure to submit his medical certificate earlier or on 9 August 2009 did not render the medical certificate void; and (d) before art. 51 can be invoked, the matter has to be referred to the Rights and Privileges Committee

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- A of the 12th Legislative Assembly. The 2nd respondent was of the view that the phrase “two consecutive meetings” in art. 51 refers to two consecutive meetings in the same session. This judicial review application was filed against the decision of the 2nd respondent.
- B **Held:**
- C (1) The Assembly was dissolved on 13 February 2008 pursuant to the Proclamation issued by HRH to that effect. No proclamation was issued to prorogue the Assembly at the end of the fifth meeting of the first session on 9 April 2009. The power to prorogue is a discretionary power of HRH under art. 53(2) acting on the advice of the State Executive Council under art. 39(1). The exercise of such power cannot be inferred, implied or deemed but must be expressly exercised by HRH in accordance with the provisions of art. 53(2) read together with art. 39(1). In the absence of evidence that HRH had expressly exercised his power to prorogue under art. 53(2), it was as a matter of administrative expediency that the meeting on 9 August 2009 was described as the 1st meeting of the 2nd session. Hence, in law, there was no 2nd session. The meeting on 9 August 2009 although described as the 1st meeting of the 2nd session in the Proclamation, was in law the 6th meeting of the 1st session. (paras 36-41)
- E
- F (2) The absence of the 1st respondent from the Assembly on 19 April 2009 and on 9 August 2009 constituted absence for two consecutive meetings in the same session *ie*, the first session as the meeting on 9 August 2009 followed from the meeting on 19 April 2009 in one uninterrupted succession.
- G (para 45)
- H (3) The phrase “two consecutive meetings” in art. 51 should be given its plain and ordinary meaning *ie*, two consecutive meetings, meaning one following the other in uninterrupted succession whether in the same session or in two separate sessions. (para 51)
- I (4) Under art. 51, the power to grant leave is conferred on the Speaker and it was therefore entirely within his discretion whether to accept or reject the MC. The 2nd respondent could not in the absence of any statutory power to that effect nor by implication arrogate to itself that power which under art. 51 is expressly conferred on the Speaker. (para 91)

- (5) Absence from a meeting is not a privilege conferred by the constitution unto members of a Legislative Assembly. Reference to the Standing Committee on Rights and Privileges is a matter of discretion and is not mandatory. The 2nd respondent had acted illegally and irrationally in deciding that the applicant must refer the matter of the 1st respondent's absence to the committee before art. 51 could be invoked. (paras 105 & 109) A
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- (6) A writ of *quo warranto* proceeding against a public officer is for determining whether he is entitled to hold the office and to discharge its functions. For a person to hold public office he must hold office in the public services set out under art. 132(1) of the Federal Constitution. However as art. 132(3)(b) of the Federal Constitution excludes the office of a member of the Legislative Assembly of a State from public service, the writ of *quo warranto* could not be issued against the 1st respondent. (paras 115-118) C
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[Order accordingly.]

Case(s) referred to:

- CCSU v. Minister for Civil Service* [1985] AC 374 (*refd*) E
- Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor* (1) [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC (*refd*)
- Fan Yew Teng v. Government of Malaysia* [1976] 1 LNS 28 HC (*refd*)
- Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener)* [2009] 4 CLJ 347 FC (*refd*) F
- Lim Cho Hock v. Speaker, Perak State Legislative Assembly* [1979] 1 LNS 45 HC (*refd*)
- Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65 FC (*refd*)
- Merdeka University Bhd v. Government of Malaysia* [1981] CLJ 175; [1981] CLJ (Rep) 191 HC (*refd*) G
- MT Khan v. Government of Andhra Pradesh* [2004] 2 SCC 267 (*refd*)
- Ram Singh Saini v. HN Bhargave*, AIR [1975] SC 1852 (*refd*)
- Thankamma v. Speaker, TC Assembly* [1952] AIR 166 (*refd*)

Legislation referred to:

- Constitution of the State of Johor, art. 23(3)
- Constitution of the State of Kedah, arts. 2, 35, 36(5), 39(1), 51, 53(2), (5) H
- Constitution of the State of Kelantan, art. 46(5)
- Constitution of the State of Malacca, art. 19(5)
- Constitution of the State of Negeri Sembilan, art. 56(5) I
- Constitution of the State of Pahang, art. 26(3)
- Constitution of the State of Penang, art. 19(5)
- Constitution of the State of Perak, arts. 35, 36(5), 63

- A Constitution of the State of Perlis, art. 55(5)
Constitution of the State of Sarawak, art. 21(5)
Constitution of the State of Selangor, art. 70(5)
Constitution of the State of Terengganu, art. 44(5)
Elections Act 1958, s. 12(3)
- B Federal Constitution, arts. 21(5), 54(1), 132(3)(b), 160
Interpretation Acts 1948 and 1967, s. 3

Constitution of India [Ind], art. 190(3)
Constitution of the Republic of Singapore [Sing], art. 46
- C **Other source(s) referred to:**
Black's Law Dictionary, 9th edn, p 47
Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament, 23rd edn, Ch 13, pp 208, 273 - 275
NS Bindra's 'Interpretation of Statutes', 10th edn, p 1285
Subhash C Kasyap's book, Parliamentary Procedure "The Law, Privileges, Practice and Precedent", pp 1745, 1752
- D *For the appellant - Hj Sulaiman Abdullah (Edmund Bon Tai Soon, Zulqarnain Lukman & Joanne Leong with him); M/s Chooi & Company*
For the 1st respondent - Datuk Mohd Hafarizam Harun (Shahir Ab Razak with him); M/s Hafarizam Wan & Aisha Mubarak
- E *For the 2nd respondent - Dato' Kamaludin Md Said (Suzana Atan & Mohd Azhar Mohd Yusof with him); SFC*
Watching brief for Kedah State Government - Anas Mohd Zaki; State Legal Adviser
- F *Reported by Amutha Suppayah*

JUDGMENT

G **Alizatul Khair Osman J:**

- [1] This is an application for judicial review by the Speaker of the Kedah State Legislative Assembly, YB Dato' Dr Abd Isa bin Ismail against the 1st respondent, the State Assemblyman ("ADUN") for the Kota Siputeh constituency of Kedah and the
- H 2nd respondent, the Election Commission.
- [2] The applicant is seeking the following orders against the 1st respondent:
- I (i) a writ of *quo warranto* to ask the 1st respondent to show cause and give confirmation how and under what basis/or authority that 1st respondent is still the State Assemblyman for Kota Siputeh;

(ii) a declaration that 1st respondent is no longer the Kota Siputeh Assemblyman; A

(iii) a declaration that the Legislative Assembly of the State of Kedah for the constituency of Kota Siputeh (N3) is vacant; and B

(iv) a mandatory injunction preventing 1st respondent and/or his agents or from carrying out the responsibilities, function and duties as Kota Siputeh Assemblyman.

[3] Against the 2nd respondent the applicant is seeking the following reliefs: C

(a) An order of *certiorari* against the 2nd respondent to quash the 2nd respondent's decision and/or action as per its letter dated 1 September 2009 that: D

(i) the Kota Siputeh State Seat is not vacant;

(ii) the 1st respondent is still the Kota Siputeh Assemblyman; and

(iii) no by-election would be held by virtue of (i) and (ii) above. E

(b) An order of *mandamus* to compel the 2nd respondent to issue a writ of election and to hold by-election to the Kota Siputeh State Seat. F

[4] Over and above the aforesaid reliefs, the applicant is also seeking damages, costs and other consequential reliefs against the respondents. G

Leave Application

[5] On 20 October 2009 I had granted leave to the applicant to file this application there being no serious objections from the Attorney-General to the application. The only objection raised was in respect of prayer (4) which is a grant of mandatory injunction against the 2nd respondent. However I was of the view that this issue can be ventilated at the hearing of the substantive application itself and need not be dealt with at this stage. H

I

A **Substantive Application**

[6] This application arose from the decision of the 2nd respondent contained in their letter of 1 September 2009 ("said decision") addressed to the applicant in response to the latter's letter dated 17 August 2009 informing the former through the State Election Officer that the Kota Siputeh (N3) seat had become vacant by virtue of art. 51 of the State Constitution due to the non-attendance at the State Assembly by the 1st respondent for two consecutive meetings ie, on 19 April 2009 and 9 August 2009.

[7] The said decision reads as follow:

*Mesyuarat yang tidak dihadiri oleh YB ADUN Kota Siputeh bukanlah dua mesyuarat berturut-turut di dalam satu penggal persidangan dalam erti kata Perkara 51 Undang-Undang Tubuh Kerajaan Kedah Darul Aman. Sebaliknya ia adalah dua mesyuarat berturut-turut untuk dua penggal yang berbeza (Tempoh masa antara penggal persidangan pertama dan penggal persidangan kedua ialah selama 3 bulan 20 hari). **Surat Cuti Sakit yang dikemukakan oleh YB ADUN Kota Siputeh diterima oleh SPR sebagai penjelasan mengenai ketidakhadiran beliau dalam Mesyuarat Dewan.** YB ADUN Kota Siputeh itu menghantar Surat Cuti Sakit kepada YB Speaker lebih awal (selewat-lewatnya pada 9 Ogos 2009) tidak menjadikan Surat Cuti Sakit itu terbatal. *SPR berpendapat bahawa sebelum Perkara 51 Undang-Undang Tubuh Kerajaan Kedah Darul Aman digunakan, ia hendaklah terlebih dahulu dirujuk kepada Jawatankuasa Hak dan Kebebasan Dewan. SPR memutuskan bahawa tiada berlaku apa-apa kekosongan pada kerusi ADUN N3 Kota Siputeh.* (emphasis added)*

Background Facts

[8] The relevant facts are as follows:

1. The Legislative Assembly of the State of Kedah ("Kedah Legislative Assembly") was dissolved on 13 February 2008 which led to the 12th General Election of the Kedah Legislative Assembly on 8 March 2008 ("12th General Election").
2. After the 12th General Election, political parties under the Pakatan Rakyat coalition succeeded in obtaining the majority of the 36 seats which were contested during the said 12th General Election and consequently formed the current Kedah State Government.

3. His Royal Highness the Sultan of Kedah (“HRH”) thereafter summoned the meeting of the Kedah Legislative Assembly on 5 May 2008 at 9am. This is the 1st meeting (of the first session) of the 12th Kedah Legislative Assembly. A
- [Exhibit AII-5 in the affidavit in support of the applicant affirmed on 28 September 2009, encl. (3).] B
4. Subsequently, HRH summoned the Kedah Legislative Assembly for another meeting on 20 May 2008 at 9am. This is the 2nd meeting (of the first session) of the 12th Kedah Legislative Assembly. C
- [Exhibit AII-6 in the affidavit in support of the applicant affirmed on 28 September 2009, encl. (3).]
5. The 2nd meeting (of the first session) was subsequently adjourned *sine die*. D
- [Exhibit AII-7 in the affidavit in support of the applicant affirmed on 28 September 2009, encl. (3).]
6. Another meeting was summoned by HRH on 25 August 2008 at 9am. This is the 3rd meeting (of the first session). E
- [Exhibit AII-8 in the affidavit in support of the applicant affirmed on 28 September 2009, encl. (3).]
7. The 3rd meeting (of the first session) was subsequently adjourned *sine die*. F
- [Exhibit AII-9 in the affidavit in support of the applicant affirmed on 28 September 2009, encl. (3).]
8. The Kedah Legislative Assembly was summoned for a 4th meeting (of the first session) on 18 November 2008 at 9am. by HRH. G
- [Exhibit AII-10 in the affidavit in support of the applicant affirmed on 28 September 2009, encl. (3).] H
9. The 4th meeting (of the first session) was subsequently adjourned *sine die*.
- [Exhibit AII-13 in the affidavit in support of the applicant affirmed on 28.9.2009, encl. (3).] I

- A 10. The 5th meeting (of the first session) was held on 19 April 2009 at 9am.
- [Exhibit AII-14 in the affidavit in support of the applicant affirmed on 28 September 2009, encl. (3).]
- B The 1st respondent was absent from the said meeting without leave of the applicant.
11. The 5th meeting (of the first session) was subsequently adjourned *sine die*.
- C [Exhibit AII-11 - 15 in the affidavit in support of the applicant affirmed on 28 September 2009, encl. (3).]
12. HRH had summoned for another meeting on 9 August 2009 at 9am as the date and time for the 1st meeting (of the second session) of the Kedah Legislative Assembly.
- D [Exhibit AII-11 - 16 in the affidavit in support of the applicant affirmed on 28 September 2009, encl. (3).]
- The 1st respondent was also absent from this meeting without leave of the applicant.
- E
13. Subsequently, the applicant was informed by one En Zaidi bin Ahmad (“Zaidi”) who is the ‘Pembantu Tadbir (Kesetiausaha)’ of the Kedah Legislative Assembly office that
- F the latter had contacted the 1st respondent on 12 August 2009 (approximately around 3pm) to inquire into the 1st respondent’s absence from the Kedah Legislative Assembly for two consecutive meetings without leave of the applicant.
- G 14. After the said telephone conversation and at approximately 5pm, the 1st respondent faxed a letter dated 10 August 2009 together with a medical certificate dated 9 August 2009 to the State Legislative Assembly’s Office and State Executive Meeting Council (‘Pejabat Dewan Undangan Negeri dan Majlis Mesyuarat Kerajaan Negeri Kedah’).
- H
15. On 16 August 2009, the 1st respondent met the applicant in the latter’s office and the 1st respondent submitted his original letter dated 10 August 2009 and the medical certificate dated 9 August 2009.
- I

16. The applicant did not accept the 1st respondent's medical certificate and his reasons for being absent on 9 August 2009 for the following reasons: A
- (a) if 1st respondent is unable to attend any meeting the said member must obtain leave from the applicant as speaker of the Kedah Legislative Assembly. Once leave is granted the applicant will inform the Kedah Legislative Assembly of his absence for further action; B
 - (b) the 1st respondent did not contact or make any attempt to contact the applicant or the Secretary of the Kedah Legislative Assembly on 9 August 2009 or anytime immediately thereafter about his absence until he was contacted by En Zaidi on 12 August 2009; C
 - (c) if the 1st respondent had indeed contacted the Opposition Leader of the Kedah Legislative Assembly, YB Dato' Seri Diraja Mahdzir bin Khalid ("opposition leader") on 9 August 2009 to inform the latter about his absence, it is perplexing that the 1st respondent would have informed the applicant about his absence on 9 August 2009; D
 - (d) the letter dated 10 August 2009 and the medical certificate dated 9 August 2009 are back-dated documents and it is an afterthought; and E
 - (e) the applicant has reason to believe that on 10 August 2009, the 1st respondent had organized and attended a programme at Kampung Kolam Tok Arang making contributions to the victims of a natural disaster at the said kampong. The programme was reported in a local newspaper called Sinar Harian (Kubang Pasu). F
17. Pursuant thereto the applicant wrote a letter dated 17 August 2009 to the election office of the State of Kedah, informing them that there is a vacancy in the Kota Siputeh State Seat. G
18. The 2nd respondent's reply on 7 September 2009 adverted to above, resulted in the present application. The 2nd respondent's reply can be summarized as follows: H
- (a) that the 1st respondent is still the Kota Siputeh Assemblyman and that there is no vacancy in the said State Seat; I

- A (b) the meetings which were not attended by the 1st respondent were not two consecutive meetings within the meaning of art. 51 of the Kedah Constitution. The two consecutive absences must occur within one 'penggal persidangan' (within one session').
- B In the present case, the two consecutive meetings which were not attended by the 1st respondent are two meetings in different sessions;
- C (c) the 2nd respondent accepted the medical certificate submitted by the 1st respondent as being the explanation for his absence at 9 August 2009 meeting. The 2nd respondent further held that the failure on the part of the 1st respondent to submit his medical certificate earlier or on 9 August 2009 did not render the medical certificate void; and
- D (d) before art. 51 of the Kedah Constitution can be invoked, the matter has to be referred to the rights and privileges committee of the 12th Legislative Assembly.
- E [Exhibit AII-22 and Exhibit AII-23 in the affidavit in support of the applicant affirmed on 28 September 2009, encl. (3).]

Issues

- F [9] The two main issues that arise from the factual matrix of this case as set out above are as follows:
- (A) What is the correct interpretation of art. 51 of the Kedah State Constitution ("art. 51").
- G (B) Who establishes whether there is a vacancy under Article 51.
- The answer to these two questions in particular (A) would determine whether or not a vacancy has occurred for the constituency of Kota Siputeh (N3) - due to the absence of the 1st respondent at the meetings on 19 April 2009 and 9 August 2009.
- H

(A) What is the correct interpretation of Art. 51

[10] Article 51 states as follows:

- I If any member of the Legislative Assembly **is absent** from the Assembly without leave of the Speaker **for 2 consecutive meetings** his seat shall become vacant. (emphasis added)

[11] The nub of the issue here is, what is the correct interpretation of the phrase “two consecutive meetings” in art. 51. A

[12] In setting out his argument on this issue counsel for the applicant submitted that three pre-conditions must be satisfied before a seat becomes vacant under art. 51. The three pre-conditions are: B

(i) a member of the Legislative Assembly must be absent from the Assembly;

(ii) he must be absent for two consecutive meetings; and C

(iii) his absence from the Assembly is without leave.

1st pre-condition

[13] The 1st pre-condition is not really in issue. Both the 1st and 2nd respondents do not dispute that the 1st respondent was absent from the State Assembly meetings on 19 April 2009 and 9 August 2009. The dispute is whether these two absences constitute being absent from the Assembly for two consecutive meetings. The 2nd respondent is of the view that the absence of the 1st respondent from these two meetings do not constitute absence for two consecutive meetings within the meaning of art. 51. The applicant contends otherwise which brings us to the 2nd pre-condition and the meaning to be ascribed to the phrase “two consecutive meetings” in this article. D E F

2nd pre-condition

[14] The 2nd respondents contention (which is supported by the 1st respondent) in a nutshell is that the phrase “two consecutive meetings” in art. 51 refers to two consecutive meetings in the same session. This can be inferred from their written submission wherein they stated, and I quote, as follows: G

It is submitted that Article 51 of UTKK (Undang-Undang Tubuh Kerajaan Kedah) gives rise to the following issue: H

Whether the **Fifth Meeting of the First Session on 19.4.2009** and the **First Meeting of the Second Session on 9.8.2009** fall within the constitutional meaning of “consecutive meetings” under Article 51 UTKK. (words in parentheses and emphasis added). I

- A** [15] It is not immediately clear what the 2nd respondent meant when they refer to the “constitutional meaning of the phrase consecutive meetings”. The 2nd respondent in their submission had conceded that the phrase “consecutive meetings” is not defined in the Kedah State Constitution.
- B** [16] The 2nd respondent however sought to define the phrase “consecutive meetings” by reference to the other provisions in the Kedah State Constitution, namely the definition of the words ‘meeting’ and ‘session’ in art. 2 read together with the definition of the word ‘sitting’ in O. 12(1)(a) and (b) of the Standing Rules and Orders of the Legislative Assembly.
- C**
- D** [17] Thus, according to the 2nd respondent following from the abovesaid definitions and based on the facts of the case, the meeting in which the 1st respondent was first absent on 19 April 2009 was the 5th meeting of the 1st session of the Legislative Assembly whilst the second meeting in which the 1st respondent absented himself on 9 August 2009 was the 1st meeting of the 2nd session.
- E** [18] In their view the Assembly had been prorogued when HRH issued the Proclamation in which the meeting on 9 August 2009 is described as the 1st meeting of the 2nd session. The effect of the Proclamation is to terminate the first session of the Assembly and to commence the second session.
- F** [19] Hence, in the 2nd respondent’s view the first meeting of the second session on 9 August 2009 cannot be considered as a “consecutive meeting” to the fifth meeting (on 19 April 2009) which was the last meeting of the first session based on the following grounds:
- G**
- (a) each session of the Assembly has its own meetings;
- (b) a session of the Assembly terminates upon it being prorogued;
- H** (c) the first session of the Assembly was prorogued by HRH as a result of the proclamation of the second session by HRH; and
- (d) the second session begins with a fresh meeting as each Session has its own meetings.
- I** [20] In other words although the 1st respondent was absent for two meetings, one following the other, he cannot be said to be absent for two consecutive meetings because the two meetings in

which he was absent were in two different sessions. Therefore according to the 2nd respondent, the phrase 2 consecutive meetings in art. 51 must be construed to mean two consecutive meetings in the same session.

A

The Application's Contention

B

[21] The gist of the applicant's argument is that the words of art. 51 of the Kedah Constitution are plain and unambiguous; therefore the phrase "two consecutive meetings" must be given its plain and ordinary meaning and must not be interpreted in a manner which can distort the true meaning of the said phrase. The plain and ordinary meaning of the phrase "two consecutive meetings" in art. 51 according to the applicant is found in the definition of the word 'consecutive' in the Shorter Oxford English Dictionary on Historical Principles, Vol 1 which is as follows:

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Following continuously: following each its predecessor in uninterrupted succession.

[22] Following this definition the applicant's argument is that the phrase "two consecutive meetings" appearing in the Kedah State Constitution can only mean one meeting following the earlier meeting in uninterrupted succession.

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[23] Applying the above definition to the facts of this case, the applicant's contention is that the 1st respondent was absent from the Legislative Assembly for two consecutive meetings.

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[24] This is because the first time the 1st respondent was absent without leave from the Legislative Assembly meeting was on 19 April 2009. Thereafter another meeting was convened on 9 August 2009. The 1st respondent was again absent from this meeting and he had failed yet again to obtain leave of the speaker. Consequently as 9 August 2009 meeting was held immediately after 19 April 2009 meeting in "uninterrupted succession", the two meetings (wherein the 1st respondent was absent) were in effect "two consecutive meetings" irrespective of whether the two meetings were in the same session or in separate sessions.

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[25] The 2nd respondent's and applicant's argument above gives rise to the following sub-issues:

- (i) Whether the 2nd respondent was right in construing the phrase "two consecutive meetings" to mean two consecutive meetings in the same session;

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- A (ii) And if so, whether in law the two meetings in question ie, on 19 April 2009 and 9 August 2009 were convened in one session as contended by the applicant or in two separate sessions as argued by the 2nd respondent. I will deal with the second sub-issue first on the assumption that the 2nd respondent was right in their construction of the said phrase as stated in (i) above.
- B

[26] In order to determine this issue it is necessary to refer to the definitions of “meeting”, “session” and “sitting”.

- C [27] Firstly, the word ‘meeting’ is defined in art. 2 of the Kedah State Constitution to mean:

D “... any sitting or sittings of the Legislative Assembly commencing when the Assembly first meets after being summoned at any time and terminating when the Assembly is adjourned *sine die* or at the conclusion of a session without adjournment.”

E “Session” in Article 2 of the Kedah State Constitution means - “the sittings of the Legislative Assembly commencing when the Assembly first meets after being constituted or after its prorogation or dissolution at any time, and terminating when the Assembly is prorogued or is dissolved without having been prorogued”.

F “Sitting” as acknowledged by both parties is not defined in the Kedah State Constitution. In the absence of such a definition reference is made to the definition of “sitting” in Standing Order 96 of the Standing Rules and Orders of the Legislative Assembly of the State (Standing Orders) (not Standing Order 12 as alleged by the 2nd Respondent) which reads as follows:

G “... a period during which the Assembly is sitting continuously (apart from any suspension) without adjournment, and includes any period during when the Assembly is in committee.”

[28] Secondly, it is not in dispute:

- H (a) that the meeting which was held on 19 April 2009 wherein the 1st respondent was absent for the first time without leave of the speaker (ie, the applicant) was the 5th meeting (of the first session);
- I (b) that at the end of the 5th meeting (of the first session), the Legislative Assembly was adjourned *sine die*;

- (c) the meeting convened on 9 August 2009 wherein the 1st respondent was absent for the second time and again without the leave of the speaker (ie, the applicant) was termed the first meeting of the second session in the Proclamation issued on 1 July 2009 (exh. A11-16, *supra*) (“said Proclamation”). (emphasis added)

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It is also not in dispute that both meetings fall within the definition of the word “meeting” in art. 2.

[29] What is in dispute is whether the first meeting summoned by HRH in the said Proclamation on 9 August 2009 is in law correctly described as the first meeting of the second session.

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[30] It is clear from the definition of the word “session” in art. 2 that a “session” commences when the Assembly first meets after being constituted or after its prorogation or dissolution at anytime. Again it is not in dispute that the meeting convened on 9 August 2009 is not the first time that the Assembly met after being constituted or after its dissolution. The only question is whether this was the first meeting of the Assembly after it was prorogued.

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[31] To answer this question, one needs to ascertain whether the first session was in law prorogued.

[32] The term prorogation is not defined in the Kedah State Constitution. In the absence of any such definition reference is made to *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 23rd edn, Ch 13 at pp. 274 - 275. According to the learned author, prorogation is essentially a situation where a Ruler decides to discontinue the session of a legislative body without dissolving it.

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[33] As opined by Erskine May at p. 27 of his Treatise - “The effect of a prorogation is at once to suspend all business, including committee proceedings until Parliament shall be summoned again, and to end the sittings of Parliament.”

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[34] The decision to prorogue, according to Erskine May is an exercise of discretion on the part of the Ruler (which in the United Kingdom is called a prerogative act of the Crown). This is reflected in art. 53(2) of the Kedah State Constitution (“said article”) which provides as follows:

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The Ruler may prorogue or dissolve the Legislative Assembly.

A In exercising his discretion under this article, the Ruler acts on the advice of the State Executive Council by virtue of art. 39(1) of the Kedah State Constitution.

[35] How does the Ruler or HRH in this case exercise his power to prorogue? In the same manner that he does in exercising his power to dissolve the Assembly ie, by issuing a Proclamation. The practice of issuing a proclamation to dissolve or prorogue the Legislative Assembly is not provided for in the Kedah State Constitution but is based on parliamentary practice in the United Kingdom whereby "Parliament is usually dissolved by proclamation". Similarly with prorogation (see p. 273, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, (supra)).

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D [36] As can be seen at exh. A11-3 in encl. (3) (*supra*), the Kedah Legislative Assembly was dissolved on 13 February 2008 pursuant to the Proclamation issued by HRH to that effect.

[37] No such proclamation was issued to prorogue the Assembly at the end of the fifth meeting of the first session on 9 April 2009. Dato' Kamaluddin Said, Senior Federal Counsel (SFC) acting for the 2nd respondent while conceding that there was no proclamation to expressly prorogue the Legislative Assembly argued that the Assembly is deemed to be prorogued when HRH issued the said Proclamation calling for the 1st meeting of the 2nd session.

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G [38] With respect I am unable to agree with his submission. As stated earlier the power to prorogue is a discretionary power of HRH under art. 53(2) acting on the advice of the State Executive Council under art. 39(1). Therefore the exercise of such power cannot to my mind be inferred, implied or deemed but must be expressly exercised by HRH in accordance with the provisions of art. 53(2) read together with art. 39(1).

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I [39] Therefore in the absence of any evidence that HRH has expressly exercised his power to prorogue under art. 53(2), I would agree with counsel for the applicant that it was as a matter of administrative expediency that the meeting on 9 August 2009 is described as the 1st meeting of the 2nd session in the said Proclamation. In law, however, based on the definition of 'session' in art. 2, the meaning of prorogation as expounded in *Erskine*

May's Treatise (*supra*), and the provisions of art. 53(2) (read together with art. 39(1)) as set out above, there was no 2nd session. A

[40] Furthermore as can be observed from the various proclamations issued it appears to be the practice in Kedah that a proclamation is issued by HRH to summon each and every meeting of the Legislative Assembly commencing from the date it was first constituted on 5 May 2008 (exh. A11-4, encl. (3)) until the last meeting on 9 August 2009 (exh. A11-14, encl. (3)). As such it would be erroneous to assume that the issuance of a Proclamation describing the meeting on 9 August 2009 as the 1st meeting of the 2nd session is *ipso facto* evidence that the Legislative Assembly has been prorogued. B C

[41] In the premises, I would agree with counsel for the applicant that the meeting on 9 August 2009 although described as the 1st meeting of the 2nd session in the said Proclamation is in law the 6th meeting of the 1st session. D

[42] This is so because at the end of the 5th meeting (of the First session) on 19 April 2009, the Legislative Assembly was adjourned *sine die* by the applicant (refer exh. A11-14, encl. (3)) and not prorogued as shown above. E

[43] Adjourned *sine die* according to *Black's Law Dictionary*, (9th edn p. 47) means to end a deliberative assembly's session without setting a time to reconvene. The distinguishing feature between an 'adjournment *sine die*' and a 'prorogation' is that in the former, the period between the prorogation of a legislative body and its reassembly in a new session is called a 'recess'. The period between the adjournment of a legislative body and resumption of its sitting is called an "adjournment". The Legislative Assembly was merely at an adjournment stage after 19 April 2009 meeting until the following meeting on 9 August 2009. F G

[44] Accordingly even though the meeting on 19 April 2009 was termed the 5th meeting (of the first session) and the meeting on 9 August 2009 was termed the 1st meeting (of the second session) in law under the Kedah State Constitution, both meetings were held in a single session because after the meeting on 19 April 2009 the Legislative Assembly was never prorogued by HRH. It was merely adjourned until its resumption on 9 August 2009. H I

A [45] On the assumption that the 2nd respondent was correct in
construing “two consecutive meetings” in art. 51 to mean two
consecutive meetings in the same session, I would hold that the
absence of the 1st respondent from the Assembly on 19 April
2009 and on 9 August 2009 constitutes absence for two
B consecutive meetings in the same session ie, the first session as
the meeting on 9 August 2009 follows from the meeting on
19 April 2009 in one uninterrupted succession.

C [46] Reverting to the first sub-issue whether the 2nd respondent
was right in construing ‘two consecutive meetings’ in art. 51 to
mean two consecutive meetings in one session, I cannot find any
support for such a construction. The SFC referred to several
authorities which set out the guiding principles in interpreting a
constitution.

D [47] One of the authorities referred to is the case of *Dewan*
Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor (1)
[1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 in which the Federal
Court quoted, *inter alia*, Bestrich CJ who was speaking for the
High Court of Australia in *AG v. the Commonwealth, ex-relatione*
E *McKinley v. Commonwealth of Australia* at p. 17, who said thus:

... the only true guide and the only course which can produce
stability in constitutional law is to read the language of the
Constitution itself, no doubt generously and not pedantically, but
F as a whole and to find its meaning by legal reasoning.

[48] That the above passage is an established canon of
constitutional construction is not in dispute. However I do not
see how a reference to the definitions of ‘meeting’ and ‘session’
in art. 2 and ‘sitting’ in section 96, if that is what is meant by
G reading the language of the constitution as a whole, would assist
the 2nd respondent in construing the words ‘two consecutive
meetings’. The 2nd respondent is not contending that giving the
phrase two consecutive meetings its plain and ordinary meaning
would lead to an anomalous result or an absurdity or is otherwise
H inconsistent with the intention of the Kedah State Constitution.
Even if it is so contended by the 2nd respondent, there is no
basis for such a contention and certainly none has been
postulated before this court.

I

[49] In my view the phrase “two consecutive meetings” in art. 51 should be given its plain and ordinary meaning. As stated in *NS Bindra’s ‘Interpretation of Statutes’* (p. 1285, 10th edn) relying on the case of *MT Khan v. Government of Andhra Pradesh* [2004] 2 SCC 267:

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The question of interpretation of a Constitution would arise only in the event of the expression contained therein being vague, indefinite and ambiguous as well as capable of being given more than one meaning.

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[50] More pertinently Eusoffe Abdoolcader J (as he then was) in the celebrated case of *Merdeka University Bhd v. Government of Malaysia* [1981] CLJ 175; [1981] CLJ (Rep) 191 opined thus:

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The Constitution is not to be construed in any narrow or pedantic sense but **this does not mean that the court is at liberty to stretch or pervert the language of Constitution** in the interests of any legal or constitutional theory or even for the purpose of supplying omission or correcting supposed errors. (emphasis added)

D

[51] Applying the aforesaid principles of law to the present case I hold that the phrase “two consecutive meetings” in art. 51 should be given its plain and ordinary meaning ie, two consecutive meetings, meaning one following the other in uninterrupted succession whether in the same (ie, one) session or in two separate sessions.

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[52] In any event even if I am wrong in my judgment on this issue, it is of little consequence because as shown earlier it has been clearly established that 1st respondent was absent for two consecutive meetings in the same session, the 2nd session not having in law been convened.

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3rd Pre-condition

[53] The issue here is whether on the facts of the case, the 1st respondent was absent for two consecutive meetings without the leave of the speaker.

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[54] It is not really in dispute that the 1st respondent did not obtain the leave of the speaker for both absences. The only issue raised by both respondents is whether the speaker should have granted leave to the 1st respondent on the ground that he was sick as apparent from his medical certificate (MC) [AII-1 of encl. (3)].

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- A [55] The 1st respondent had, on 12 August 2009 faxed his letter dated 10 August 2009 together with his MC to Zaidi after the latter had notified him earlier (on the same day) about his failure to attend the meeting of the Assembly on 9 August 2009. Subsequently the 1st respondent officially met the applicant on
- B 16 August 2009 stating the reason for his absence and enclosing the original copy of his letter dated 10 August 2009 and the MC which was for two days from 9 - 10 August 2009. The 1st respondent raised several allegations against the applicant in relation to this issue *viz*:
- C (i) the applicant failed to inform 1st respondent whether he accepted or rejected 1st respondent's explanation for his absence but instead acted unilaterally, in excess of his powers and with *mala fide* in informing the Kedah State Elections
- D Director that the Kota Siputeh seat (N3) had fell vacant;
- (ii) the 1st respondent had the legitimate expectation to be informed by the applicant of "such an important matter";
- (iii) the applicant did not act "with utmost sincerity, honesty and
- E impartiality" in dealing with this matter as expected of a speaker when dealing with issues affecting members of the legislative assembly (as compared to India and England).
- F [56] In relation to the abovesaid allegations in particular, that the applicant had acted *mala fide* in excess of his powers in the circumstances set out therein, it must be pointed out that the 1st respondent is not challenging the applicant's action or decision as such. Therefore it is not relevant to the issue at hand. However as the 2nd respondent has more or less raised the same
- G allegation(s) (as in (i) and (iii) above) in their letter of 1 September 2009 ("the said letter"); I will elaborate further on these issues later in my judgment.
- H [57] As to the 1st respondent's allegation that he had been denied his legitimate expectation of being informed of the applicant's decision to accept or respect his offer of explanation for his absence on 9 August 2009, this is clearly without merit as the applicant had on the day following the 1st respondent's meeting with the applicant, *vide* letter dated 17 August 2009 notified the 1st respondent that his seat had fallen vacant
- I pursuant to art. 51 due to his absence from the Assembly for two consecutive meetings without the leave of the speaker. [Refer exh. AII-3, 1st respondent's own office in reply, encl. (15).]

[58] Thus as far as the 3rd condition is concerned, it cannot as a matter of fact be disputed that no leave had been obtained by the 1st respondent from the applicant in respect of his absence on 9 August 2009. A

[59] In the circumstances it would appear that all three pre-conditions under art. 51 have been fulfilled. B

[60] That being the case it is therefore the contention of the applicant that as all three pre-conditions in art. 51 had been fulfilled the 1st respondent's seat had by operation of law fallen vacant. C

[61] This brings us to the second issue that falls to be determined in the present case.

(B) Who Establishes Whether There Is A Vacancy Under Art. 51 D

[62] To reiterate what the applicant has stated earlier, their position is that once it has been established that all three pre-conditions have been fulfilled then the 1st respondent's seat in the Legislative Assembly became vacant by operation of law. E

[63] Upon the seat becoming vacant, the applicant as speaker is duty bound according to counsel, to inform the 2nd respondent of the vacancy which he did in this instance *vide* his letter dated 17 August 2009 [exh. AII-20, encl. (3)]. F

[64] As stated earlier, it is the 2nd respondent's reply to this letter contained in their letter of 1 September 2009 which has led the applicant to file this present application.

[65] To recapitulate, in their said letter of 1 September 2009, the 2nd respondent replied to the following effect: G

18. Setelah meneliti dokumen dan mengkaji fakta yang dikemukakan kepada SPR serta kedudukan undang-undang yang berkaitan, pada menjalankan kuasa di bawah Fasal (5) Perkara 53 Undang-Undang Tubuh Kerajaan Kedah, SPR memutuskan seperti yang berikut: H

Mesyuarat yang tidak dihadiri oleh YB. ADUN Kota Siputeh bukanlah dua mesyuarat berturut-turut di dalam satu penggal presiding dalam erti kata Perkara 51 Undang-Undang Tubuh Kerajaan Kedah Darul Aman. Sebaliknya ia adalah dua mesyuarat berturut-turut untuk dua penggal yang berbeza (Tempoh masa antara penggal presiding pertama I

- A dan penggal presiding kedua ialah selama 3 bulan 20 hari).
Surat Cuti Sakit yang dikemukakan oleh YB. ADUN Kota
Siputeh diterima oleh SPR sebagai penjelasan mengenai
ketidakhadiran beliau dalam mesyuarat Dewan pada 9 Ogos
2009. SPR juga mendapati bahawa kegagalan YB. ADUN
B Kota Siputeh itu menghantar Surat Cuti Sakit kepada YB.
Speaker lebih awal (selewat-lewatnya pada 9 Ogos 2009)
tidak menjadikan Surat Cuti Sakit itu terbatal. SPR
berpendapat bahawa sebelum Perkara 51 Undang-Undang
Tubuh Kerajaan Kedah Darul Aman digunakan, ia
hendaklah terlebih dahulu dirujuk kepada Jawatankuasa Hak
C dan Kebebasan Dewan. SPR memutuskan bahawa tiada
berlaku apa-apa kekosongan pada kerusi ADUN N. 3 Kota
Siputeh.

D [66] The main thrust of the applicant's submission with regard
to the reply by the 2nd respondent is that in arriving at its
decision as such, the 2nd respondent had committed an error of
jurisdiction. Therefore it is substantively *ultra vires* and an illegality.

E [67] The 2nd respondent's assertion is premised on the wording
of art. 51 which in their view is clear and unambiguous. Once the
pre-conditions are fulfilled then by operation of law the state seat
of Kota Siputeh becomes automatically vacant. No other
institution including the 2nd respondent is empowered to interfere
in the operation of the article.

F [68] In addition only the speaker (ie, the applicant) is
empowered to exercise the discretionary power conferred upon it
under art. 51. It goes without saying therefore that no other
institution is authorised to assume or usurp that power. There is
also no room under art. 51 for such power to be delegated. The
G 2nd respondent has in this instance in making the decision as per
the letter dated 1 September 2009 acted under a misconception
of law in assuming it has the power and jurisdiction to determine
and decide on matters which fall within the purview of art. 51.

H [69] In this regard, the applicant sought to distinguish the recent
case of *Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju
Naidu; Suruhanjaya Pilihan Raya (Intervener)* [2009] 4 CLJ 347
(*Jamaluddin's* case) whereby the Federal Court held in determining
the issue whether the Elections Commission is the rightful entity
which establishes if there is a casual vacancy of the State
I Legislative Assembly *inter alia*, as follows:

On a plain reading of Article 36(5) of the Perak Constitution read together with s. 12(3) of the Elections Act 1958 it is the Election Commission that establishes the casual vacancy and not the Speaker.

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[70] Counsel for the applicant, Tuan Haji Sulaiman Abdullah (Tuan Hj Sulaiman) argued that in *Jamaluddin's* case the learned Federal Court judge Nik Hashim FCJ, in arriving at the aforesaid decision was largely influenced by the wordings of art. 46 of the Constitution of the Republic of Singapore and art. 190 of the Constitution of India relating to the resignation of a Member of Parliament (in the case of Singapore) and a Member of the State Legislature (in the case of India), when compared with the relevant article in the Perak State Constitution [ie, art. 36(5)]. After examining art. 46 and art. 190 of the Constitution of the Republic of Singapore and the Constitution of India respectively the learned Federal Court judge surmised as follows:

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These two articles of the Constitution of Singapore and India clearly state that a seat becomes vacant when a Member of Parliament and House of the Legislature of a State respectively writes to the Speaker informing him of the resignation. In contrast, Article 35 of the Perak Constitution merely states that a member of the State Legislative Assembly may resign his membership by writing under his hand addressed to the Speaker.

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[71] The learned Federal Court judge went on to emphasise that the phrase "shall become vacant" is also not part of art. 35 or art. 36(5) of the Perak State Constitution thus distinguishing the position in Perak from that of India and Singapore.

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[72] Thus, reasoned counsel for the applicant, it is evident from the above passage that it is because of the absence of the phrase "shall become vacant" that led the Federal Court to hold that the Election Commission had the power to establish a casual vacancy for matters arising from art. 35 of the Perak Constitution. In effect, according to counsel, it tantamounts to the Federal Court saying that the Election Commission has no power to determine whether there is any casual vacancy in the State seat if the phrase "shall become vacant" appears in art. 35 of the Perak Constitution.

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[73] Thus, as art. 51 contains the phrase "shall become vacant" therefore it is abundantly clear according to counsel, that in relation to matters falling within the purview of art. 51, the 2nd respondent has no jurisdiction whatsoever, as once the pre-

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- A conditions have occurred, then the seat becomes automatically vacant. The corollary would be that the 2nd respondent has no power to establish casual vacancy if a seat falls vacant pursuant to the provisions of art. 51. In other words the 2nd respondent's power to establish casual vacancy has been ousted by the clear wording of art. 51.
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The 1st And 2nd Respondents' Contention

- [74] The 2nd respondent relied on *Jamaluddin's* case to argue that the power to establish a casual vacancy under the Kedah State Constitution rests on the 2nd respondent by virtue of art. 53(5) of the Kedah State Constitution (art. 53(5)) read together with s. 12(3) of the Elections Act 1958. The 2nd respondent was further of the view that as art. 53(5) is constructed in similar if not the same terms as art. 36(5) of the Perak State Constitution the 2nd respondent is under a constitutional duty to establish whether there was a casual vacancy based on the Federal Court's decision in *Jamaluddin's* case, notwithstanding the applicant's contention that under art. 51 a seat falls vacant by operation of law upon the occurrence of the pre-conditions stipulated therein.
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- [75] Counsel for the 1st respondent, Dato' Mohd Hafarizam in support of the 2nd respondent's position on this issue argued at length that art. 51 is, in counsel's words "not a standalone article" for purposes of determining whether a casual vacancy has arisen or not. Learned counsel is of the view that as art. 53(5) imposes a duty on the 2nd respondent to establish casual vacancy the 2nd respondent cannot act as a mere rubber stamp and accept that a casual vacancy has occurred under art. 51 upon being informal as such by the applicant. In fact it is counsel's view where, as in this case there are allegations that there was a failure to attend two consecutive meetings it is the duty of the Election Commission (ie, the 2nd respondent) by virtue of art. 53(5), "to establish ie, to ascertain beyond a reasonable doubt whether there is a casual vacancy." Learned counsel referred to the case of *Thankamma v. Speaker, TC Assembly* [1952] AIR 166 (*Thankamma*) which he opined would by way of analogy apply to the present case. That case dealt with art. 190(3) of the Indian Constitution which provides that if a member resigns his seat and his resignation is accepted by the speaker, his seat shall therefore become vacant.
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... This provision necessarily indicates that the letter of resignation must proceed from the member and that the resignation must relate to a membership held by the person who sends the same. The mere receipt by the Speaker of a letter of resignation purporting to be from a member will not cause that member's seat to become vacant. It is open to the honourable Speaker to enquire whether that is a genuine letter or a forged letter, or one obtained by fraud or force is only a void document. The position taken, that the honourable Speaker has no right to enquire into any matter relating to resignation cannot therefore be sustained. What is contemplated in the section is a resignation with the full consent of the writer of his or her own volition and not any letter of resignation. From the facts placed before me and the allegations not controverted by the opposite parties, I take it that the following facts are to be established.

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[76] Relying on the above judgment, it is learned counsel's contention that the 2nd respondent must be entitled to look at other contemporaneous documents and evidence in order to establish whether there is a vacancy.

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[77] As with the 1st respondent, counsel for the 2nd respondent relied on *Jamaluddin's* case to submit that on a true interpretation of art. 51 "read harmoniously" with art. 53(5), the speaker has no role to play in establishing any vacancy and that on a plain reading of art. 53(5) it is the Election Commission that establishes a casual vacancy and not the speaker.

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In order to answer the question posed in the 2nd issue:

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Who establishes whether there is a casual vacancy under the Kedah State Constitution,

it is necessary, firstly, to refer to art. 53(5) and s. 12(3) of the Elections Commission Act 1958. Article 53(5) stipulates that:

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A casual vacancy shall be filled within sixty days from the date on which it is **established by the Election Commission that there is a vacancy**. (emphasis added)

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[78] Section 12(3) of the Elections Act 1958 provides that:

In relation to a vacancy, which is to be filled at a by-election, a writ shall be issued not earlier than four days and not later than ten days from the date on which **it is established** by the Election Commission that there is a vacancy. (emphasis added)

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- A [79] For the sake of completeness, ‘casual vacancy’ is defined under art. 160 of the Federal Constitution to mean “a vacancy arising in the House of Representative or a Legislative Assembly otherwise than by dissolution of Parliament or of the Assembly”. As stated earlier although this issue had been decided by the
- B Federal Court in *Jamaluddin’s* case, the applicant sought to distinguish the facts of that case from the present case to argue that the decision in that case is not binding on this court.
- C [80] In *Jamaluddin’s* case the issue revolved around the alleged resignation of the three State Assemblymen in question ie, Jamaluddin Mohd Radzi, Mohd Osman Mohd Johar and Hee Yit Fong (the appellants), who had won the Perak State seats of N39 Behrang, N14 Changkat Jering and N31 Jelapang respectively in the 12th General Election. All three State Assemblymen had
- D purportedly resigned from their political parties in the Pakatan Rakyat coalition government and had given their support to the Barisan Nasional as independents causing the collapse of the Pakatan State Government.
- E [81] In early February 2009, the respondent speaker had received resignation letters pre-signed from the three applicants and had declared their seats vacant. However the Election Commission in that case refused to hold by-elections on the ground that there was an ambiguity as to whether the applicants had resigned
- F voluntarily. In view of the uncertainty surrounding the issue, the three applicants filed a suit against the respondent speaker in the Ipoh High Court seeking a declaration that they were still elected representatives. The matter was then referred directly to the Federal Court under art. 63 of the Perak State Constitution.
- G [82] The questions for determination before the Federal Court were as follows:
- H (1) Whether, on a true interpretation of art. XXXVI(5) (“art. 36(5)”) of the Perak Constitution read together with s. 12(3) of the Elections Act 1958, the Election Commission is the rightful entity which establishes if there is casual vacancy of the State Legislative assembly seat;
- I (2) When a resignation of a member of the Perak State Legislative Assembly (“the SLA”) is disputed, is such resignation a resignation within the meaning as ascribed under art. 35 of the Perak Constitution.

[83] For the purposes of this case, it is question (1) which is pertinent. As stated earlier, the Federal Court had answered in the affirmative in respect of question (1). And as adverted to earlier, Tuan Haji Sulaiman was of the view that the Federal Court arrived at that conclusion after comparing arts. 46 and 190 of the constitutions of Singapore and India respectively, with that of art. 35 of the Perak State Constitution.

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[84] The Federal Court said, and I quote:

The phrase 'shall become vacant' is also not part of art 35 or art. 36(5) of the Perak Constitution. Therefore, the position in Perak is different from that of India and Singapore in that the seat shall not become vacant merely by the fact that a resignation letter is being handed to the Speaker.

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[85] Further on in their judgment the Federal Court opined that - "under art. 35 of the Perak Constitution, the speaker's role is limited to receiving the written resignation letter of the Assemblyman and forwarding the same to the Election Commission which will then by its own procedure determine whether a casual vacancy has arisen or not."

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[86] Tuan Haji Sulaiman suggested that based on the aforesaid passage, it would appear that the Federal Court would have arrived at a different conclusion had the words "shall become vacant" were found in art. 35 of the Perak State Constitution. That being the case, as art. 51 provides that a member of the Legislative Assembly's seat shall become vacant upon the member being absent for two consecutive meetings without leave of the speaker, following the Federal Court judgment as quoted above that seat shall become vacant by operation of law once the three pre-conditions stated therein have occurred. The Election Commission, ie, the 2nd respondent have no role to play in these circumstances unlike the situation in Perak where the article in question (art. 35) does not expressly provide for a member's seat to become vacant upon the member (of the State Legislative Assembly) tendering his letter of resignation to the speaker.

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[87] I have perused very carefully the judgment of the Federal Court and I am not entirely in agreement with Tuan Haji Sulaiman on this issue.

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- A [88] In my view the Federal Court in holding that the Election Commission is the rightful entity to establish casual vacancy for the purpose of art. 36(5) of the Perak State Constitution read together with s. 12(3) of the Elections Act 1958, did so after comparing the provisions in the other State Constitutions namely
- B the State Constitution of Kelantan (art. 46(5)), Malacca (art. 19(5)), Pahang (art. 26(3)), Penang (art. 19(5)), Perlis (art. 55(5)), Sarawak (art. 21(5)) and Kedah (art. 53(5)) which are equipollent to art. 36(5), with the provision in the constitutions of the State of Johore (art. 23(3)), Negeri Sembilan (art. 56(5)),
- C Selangor (art. 70(5)) and Terengganu (art. 44(5)). The latter state constitutions provide that "A casual vacancy shall be filled within sixty days from the date on which it occurs". The word "established by the Election Commission" is omitted from these state constitutions. The Federal court also examined the provisions
- D of the Sabah State Constitution and the Federal Constitution (art. 21(5) and 54(1) respectively) before arriving at the following conclusion:

- E It must be noted that the word 'establish' only appears in the Constitutions of Sabah, Kelantan, Malacca, Pahang, Penang, Perlis, Sarawak, Kedah and Perak and the Federal Constitution. It is clear therefore that in the case of a casual vacancy of the State seats of these States, except Sabah, and of a seat in the House of Representatives, the Election Commission has been given the power to establish a casual vacancy. However, the
- F Sabah constitution is silent as to which entity has the responsibility for establishing the casual vacancy. The Constitutions of the States of Johore, Negeri Sembilan, Selangor and Terengganu have intentionally omitted the establishment by the election Commission of a casual vacancy.

- G [89] Bearing in mind that the word 'establish' appears in art. 53(5) I am therefore of the view based on the above judgment that whilst art. 51 sets out the conditions under which a seat becomes vacant, by virtue of art. 53(5) read together with s. 12(3) of the Elections Act 1958, it is the duty of the Election
- H Commission to establish or determine whether a casual vacancy has in fact occurred. In other words art. 51 does not oust the power of the 2nd respondent to establish casual vacancy under art. 53(5). For the purpose of carrying out its duty under art. 53(5) the 2nd respondent has merely to satisfy itself that the
- I three pre-conditions in art. 51 has as a matter of fact been fulfilled.

[90] The constitutional duty imposed on the 1st respondent under art. 53(5) does not in my view go so far as to empower the 1st respondent to encroach on the powers of the applicant (ie, the speaker) as it appeared to have done here when it decided:

(i) firstly, to accept the medical certificate ("MC") submitted by the 1st respondent as being a valid reason for his absence from 9 August 2009 meeting of the Legislative Assembly, and that

(ii) failure on the part of the 1st respondent to submit his MC earlier or on 9 August 2009 did not render the MC void.

[91] Under art. 51, the power to grant leave is conferred on the speaker and it is therefore entirely within his discretion whether to accept or reject the MC.

[92] The Election Commission (ie, the 2nd respondent) cannot in the absence of any statutory power to that effect nor by implication arrogate to itself that power which under art. 51 is expressly conferred on the speaker. The Federal Court, in *Jamaluddin's* case did not in my view go so far as to suggest that the Election Commission in carrying out its constitutional duty under art. 36(5) (of the Perak State Constitution) is entitled by virtue of such duty to encroach upon the powers of the speaker.

[93] This is clearly borne out by the following passage of the judgment:

Under Article 35 of the Perak Constitution, the Speaker's role is limited to receiving the written resignation letter of the assemblyman and forwarding the same to the Election Commission which will by its own procedure determine whether a casual vacancy has arisen or not. Once the casual vacancy is established then it is the duty of the Election Commission to fill the vacancy by holding a by-election. *With the clear provisions of the respective powers of the Election Commission and the Speaker, the fear of encroachment with the doctrine of separation of powers by one body into another does not arise.* (emphasis added).

[94] The case of *Thankamma (supra)* referred to earlier by counsel for 1st respondent bears little relevance to the present case as it dealt with the speaker's power in relation to letters of resignation issued by members of the house. The court there held that the speaker upon receipt of such letters has the right to make enquires to determine whether the letter is genuine or forged.

- A [95] In *Jamaluddin's* case the effect of a member's letter of resignation to the speaker under art. 35 of the Perak State Constitution is not clearly defined. As such the Federal Court relied on *Thankamma's* case to hold, by way of analogy, that the Election Commission in carrying out its duty under art. 36(5) is entitled to inquire into any matter relating to the purported resignation. The power to grant leave of absence in the present case is, on the other hand unequivocally conferred on the speaker (ie, the applicant) under art. 51.
- B
- C [96] Therefore *Thankamma's* case has no application by way of analogy or otherwise.
- [97] Counsel for the 1st respondent had earlier submitted that the applicant's action in refusing to accept the 1st respondent's MC is tainted with *mala fide*, politically motivated and an abuse of power. He contended that the applicant in doing so had departed from the dictates of 'fair play', 'equity' and 'rationality' required of a speaker when exercising his duties when compared to a speaker exercising his duties in India and England.
- D
- E [98] In this regard he referred to the procedure in relation to leave of absence for Members of the House in India as contained in *Subhash C Kasyap's book, Parliamentary Procedure "The Law, Privileges, Practice and Precedent"*, in particular following the excerpt at p. 1752:
- F
- Normally the statement of the member that he is applying for leave of absence on grounds of illness is accepted and he is not asked to furnish a medical certificate.
- G [99] He also referred to the procedure in the House of Commons in England as set out in *Erskine May* at p. 208 to the following effect:
- H
- In the absence of any specific orders to that effect, Members are presumed to be in attendance in Parliament. It is not now considered necessary for a Member to be given leave of absence in the ordinary course of his business, but such leave has been frequently given to official delegations from the House, especially to those commissioned to present gifts to the Parliaments of newly independent Commonwealth countries.
- I [100] In answer to counsel's submission, it must be pointed out, that the procedure in relation to leave of absence of a Member of the House in India is different from that of a member of the Legislative Assembly in Kedah as provided under art. 51. In India,

all applications from members for leave of absence must be referred to the committee on absence of members from the sittings of the house. The committee considers the applications and presents its report to the house, whereupon the speaker will inform the house of the recommendation of the committee and the house will then decide whether to agree or disagree with the committee's recommendation (p. 1745 of *Subash C Kasyap's book*, (*supra*)).

A

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[101] As far as the procedure in the house of commons is concerned the same argument would apply.

C

[102] Even if one were to assume that implicit in art. 51, the speaker should not unreasonably withhold leave, the applicant had, on the facts, shown that he had not acted unreasonably in rejecting the MC. Rather, based on the reasons he had given which included, *inter alia*, the fact, that the 1st respondent was photographed attending a function on 10 August 2009 (the day he was supposed to be on MC), the applicant had acted as any reasonable man in his position would have acted.

D

[103] In any event if it is 1st respondent's view that the applicant had acted unreasonably in not granting him leave of absence for the meeting on 9 August 2009 then it is for the 1st respondent to challenge the speaker's decision and not for the 2nd respondent to assume for itself the power to overrule the decision of the 1st respondent and to accept the MC as a valid reason for the 1st respondent's absence, when it had no power to do so. In doing so the 2nd respondent had acted illegally and irrationally.

E

F

[104] Secondly, the 2nd respondent is clearly misconceived in asserting that before art. 51 is invoked it is necessary for the matter to be referred to the rights and privileges committee.

G

[105] Absence from a meeting is not a privilege conferred by the constitution unto members of a Legislative Assembly. According to Erskine May, "parliamentary privileges" are peculiar rights enjoyed by a legislative assembly and by its members individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.

H

See: *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd version, chapter 5 at page 75.

I

- A [106] Based on the aforesaid definition the act of being absent (from a meeting) can never be considered a privilege which can be enjoyed by members of a Legislative Assembly. In any event whether a member (of the Legislative Assembly) ought to be referred to the rights and privileges committee and any proceedings related thereto are matters which fall strictly within the purview of the Kedah Legislative Assembly and the applicant as speaker representing the house.

- C [107] The 2nd respondent therefore has no power to direct the matter of the 1st respondent being absent from the Assembly to be referred to the committee as reference to the committee is a matter of discretion and is not mandatory.

- D [108] The court's decisions in *Fan Yew Teng v. Government of Malaysia* [1976] 1 LNS 28 and *Lim Cho Hock v. Speaker, Perak State Legislative Assembly* [1979] 1 LNS 45 amongst others would support this view. In the latter case the applicant applied by originating summons for the determination of the question whether the seat of a member of the Legislative Assembly, who was also the speaker, had been vacated as he had not taken the oath required of a member. The court held that the Legislative Assembly is the final arbiter in any question arising as to whether a member of the Legislative Assembly had become disqualified for membership. The matters raised were for the Legislative Assembly to decide and within its inclusive jurisdiction and not for the courts to determine. In the course of his judgment, Eusoffe Abdoolcader J observed:

- G Under the *lex et consuetude* parliament, the Assembly has control over its proceedings, procedure and its members and may decide questions as to their qualifications and disqualification. (emphasis added)

- H [109] Thus the 2nd respondent had acted illegally and irrationality when it decided that the applicant must refer the matter of the 1st respondent's absence to the standing committee on rights and privileges before art. 51 can be invoked.

[110] To sum up these are my findings:

- I (i) all three pre-conditions of art. 51 have been fulfilled;
(ii) since all three pre-conditions of art. 51 have been fulfilled the seat of the 1st respondent appears to have fallen vacant;

- (iii) although the fulfilment or occurrence of the three pre-conditions under art. 51 have resulted in the 1st respondent's seat being vacant, yet by virtue of art. 53(5) and the Federal Court's decision in *Jamaluddin's* case, the duty to establish a casual vacancy rests with the 2nd respondent (ie, the election commission); A
- (iv) the duty to establish a casual vacancy under art. 53(5), however does not extend to the 2nd respondent encroaching or arrogating to itself the powers of the applicant under art. 51; B
- (v) for the purpose of establishing casual vacancy under art. 51 the 2nd respondent has merely to satisfy itself that the three pre-conditions has as a matter of fact been fulfilled. C
- [111]** In the light of the above findings I therefore agree with the applicant's submission that the 2nd respondent: D
- (i) had committed an error of jurisdiction when it decided that there is no vacancy in the Kota Siputeh State Seat and that the 1st respondent is still the Assemblyman of Kota Siputeh; E
- (ii) had acted irrationally and *ultra vires* its powers when it had accepted the medical certificate and reason advanced by the 1st respondent when it had no power to do so as the power lies solely in the hands of the speaker pursuant to art. 51 of the Kedah Constitution; F
- (iv) had acted *ultra vires* its powers and irrationally when it decided the speaker (ie, the applicant) must refer the matter to the rights and privileges committee before art. 51 of the Kedah Constitution can be invoked since the subject matter in question is not a matter of rights and privileges of the Member of Kedah Legislative Assembly; G
- (see the cases of *CCSU v. Minister for Civil Service* [1985] AC 374; *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65 where the courts have held that administrative action is subject to control by judicial review on the grounds of illegality, irrationality and procedural impropriety.) H

I

A [112] Pursuant to the above I therefore granted the reliefs sought by the applicant:

(i) As against the 1st respondent:

B (a) a declaration that the 1st respondent is no longer the Kota Siputeh Assemblyman;

(b) a declaration that the seat of the Legislative Assembly of the State of Kedah for the constituency of Kota Siputeh (N. 3) is vacant;

C (c) a mandatory injunction preventing the 1st respondent and/or his agents and/or his servants from acting and/or exercising and/or carrying out the responsibilities, functions and duties as Kota Siputeh Assemblyman.

D (ii) As against the 2nd respondent:

(a) an order of *certiorari* to quash the 2nd respondent's decision as per its letter dated 1 September 2009;

E (b) an order of *mandamus* to compel the 2nd respondent to issue a writ of election and to hold a by-election for the Kota Siputeh state seat.

F [113] Although initially sought for in his application, the applicant has decided not to pursue his claim for damages nor is he asking for cost. As such no order was made for damages and costs.

G [114] I had also refused to issue a writ of *quo warranto* sought for by the applicant against the 1st respondent. The applicant is seeking this writ to order the 1st respondent to show cause and give information how and under what basis or power or authority that the 1st respondent is still a Member of the Legislative Assembly of the State of Kedah for the Constituency of Kota Siputeh (N3) and purport to act and/or exercise and/or carry out the responsibilities, functions and duties as Kota Siputeh Assemblyman.

H [115] It is not disputed by both parties that an essential element that needs to be determined before a writ of *quo warranto* could be issued is that the office in question must be a public office.

I (see *Ram Singh Saini v. HN Bhargave*, AIR [1975] SC 1852.)

A writ of *quo warranto* proceeding against a public office is for determining whether he is entitled to hold the office and to discharge its functions. A

[116] The *Black's Law Dictionary* (7th edn) defines "public office" as "A position whose occupant has legal authority to exercise a government's sovereign powers". B

[117] "Public office" is defined in s. 3 of the Interpretation Acts 1948 and 1967 ("the Act") to mean an 'office in any of the public services'. The Act further defines "public services" as the "public services" mentioned in art. 132(1) of the Federal Constitution. Article 132(1) categorized the type of services that would be recognized as "public services". However art. 132(3) provides that the public service shall not be taken to comprise the following: C

(a) ... D

(b) The office of President, Speaker, Deputy President, Deputy Speaker or **member** of either House of Parliament or **of the Legislative Assembly of a State**; or

(c) ... E

(d) ...

(e) ...

(emphasis added) F

[118] Thus, it is clear from the above for a person to hold public office he must hold office in the public services set out under art. 132(1) of the Federal Constitution. However as art. 132(3)(b) of the Federal Constitution excludes the office of a member of the Legislative Assembly of a State from public service, the writ of *quo warranto* cannot be issued against the 1st respondent. For this reason I agree with counsel for the 1st respondent that the applicant's prayer for a writ of *quo warranto* against the 1st respondent ought to be dismissed. G H

I